SUPREME COURT, U. S.
Supreme Court, U.S.
FILED
DEC 10 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS,
THE CITY OF FORT WORTH, TEXAS,
AND THE DALLAS-FORT WORTH
REGIONAL AIRPORT BOARD,

Petitioners,

v.

SOUTHWEST AIRLINES CO., and
THE TEXAS AERONAUTICS COMMISSION,

Respondents.

REPLY BRIEF FOR PETITIONERS

N. ALEX BICKLEY,
City Attorney
City of Dallas, Texas
501 City Hall
Dallas, Texas 75201

S.G. JOHNDROE, JR.,
City Attorney
City of Fort Worth, Texas
1000 Throckmorton Street
Fort Worth, Texas 76102

LEE E. HOLT,
Legal Counsel
Dallas-Fort Worth Regional
Airport Board
P.O. Drawer DFW
Dallas-Fort Worth Airport
Texas 75261

ERWIN N. GRISWOLD
JAMES M. BURGER
Jones, Day, Reavis & Pogue
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

CHARLES S. RHYNE
COURTS OULAHAN
ALFRED J. TIGHE, JR.
DAVID M. DIXON
Rhyne & Rhyne
400 Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF AUTHORITIES

Page

Cases:

Burbank v. Lockheed Air Terminal, 411 U.S. 624 6

Southern Pacific Co. v. Arizona, 325 U.S. 761 13

Statutes:

Air Commerce Act of 1926, ch. 344, 44 Stat. 568 2

Airport and Airway Development Act of 1970, 49 U.S.C. § 1701 *et seq.* (1970) 2

Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 2

Federal Airport Act, ch. 251, 60 Stat. 170 (1946) 2, 5, 6

Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.* (1970) 2, 4, 6, 7, 11

Miscellaneous:

14 C.F.R. § 121.391 (1974) 4

49 C.F.R. § 1.47(a) (1973) 3

Frontier Certificate Renewal Case, 14 C.A.B. 519 (1951) 5

FAA Order No. 5190.6, "Airports Compliance Requirements" 4, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS,
THE CITY OF FORT WORTH, TEXAS,
AND THE DALLAS-FORT WORTH
REGIONAL AIRPORT BOARD,

Petitioners,

v.

SOUTHWEST AIRLINES CO., and
THE TEXAS AERONAUTICS COMMISSION,

Respondents.

REPLY BRIEF FOR PETITIONERS

This reply brief is submitted in order to answer certain arguments made in the Brief in Opposition submitted by the two respondents, Southwest Airlines Co. (Southwest), and the Texas Aeronautics Commission (TAC), respectively.

I.

The respondents consistently underplay the role of the Federal Government with respect to airport development. The Southwest brief does, however, cite (Br. 45) 49 U.S.C. § 1508(a) where Congress, in the Federal Aviation Act of 1958, provided that:

> The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States . . .

The respondents seek to avoid this, saying that Congress has specifically exempted intrastate aviation from regulation other than that pertaining to air safety retained by the Administrator of the FAA pursuant to 49 U.S.C. § 1655(c)(1).

This argument reads too much into the limitation on the power of the federal agencies with respect to intrastate commerce. That limitation relates to economic regulation by the CAB, such as the granting of a certificate of public convenience, and the regulation of fares. But Congress has not limited the powers of its agencies over other aspects of air commerce, and specifically with respect to airports. Congress recognized the essential role of *both* airways and airports in the Air Commerce Act of 1926 (ch. 344, 44 Stat. 568), the Civil Aeronautics Act of 1938 (ch. 601, 52 Stat. 973), the Federal Aviation Act of 1958 (49 U.S.C. §§ 1301(4), 1303, and 1348), the Federal Airport Act of 1946 (49 U.S.C. § 1101 *et seq.*) and the Airport and Airway Development Act of 1970 (49 U.S.C. § 1701 *et seq.*). The suggestion that

intrastate aircraft are subject to FAA jurisdiction only when they navigate the airways, and that the Federal Government has not sought to exercise control over the use of airports is not tenable.

Southwest attempts to limit FAA jurisdiction to the powers over air safety listed in 49 U.S.C. § 1655(c)(1). That restriction ignores the comprehensive scope of the Federal Aviation Program enacted by Congress. In regulating airports, the Administrator of the FAA acts not only in an air safety capacity, but as the delegate of the Secretary of the Department of Transportation.[1] As such the Administrator's authority extends to "air commerce," and he is directed (49 U.S.C. § 1303, emphasis supplied) to exercise his powers over "air commerce in such manner as to best promote its *development* and safety . . ." The Administrator is also directed to promote, encourage, and develop civil aeronautics. Finally, in controlling the navigable air space (including that necessary for landing and takeoff), and in regulating civil aviation operations, the Administrator must do so in the interest of "safety and *efficiency*." The national airport system, as Congress has many times recognized, is the key to the national aviation system. For the FAA to ignore this in its role of fostering the development of air commerce would be contrary to its specific statutory responsibilities.

Intrastate commerce is not exempted from this scheme. Air commerce by definition under the Federal Aviation Act, includes "any operation or navigation of aircraft within the limits of any Federal airway or any

[1] The delegation is made by 49 C.F.R. § 1.47(a) (1973).

operation or navigation of aircraft which *directly affects*, or which may endanger safety in, interstate, overseas, or foreign air commerce." (49 U.S.C. §1301(4), emphasis supplied.) Southwest concedes that its operations are included within air commerce. (Br. 25) It, nevertheless, argues that the FAA's plan to close Love Field to *all* scheduled airline service is an economic regulation and therefore is ineffective.[2] Such regulation has nothing to do with certificates or with fares. It is no more or less economic than the requirement of the FAA that each of Southwest's aircraft must have one flight attendant for each fifty seats (14 C.F.R. §121.391), or the pending proceedings before the FAA relating to the carriage of handicapped persons (39 Fed. Reg. 24667, July 5, 1974). Southwest's operations are subject to all.

The FAA does not make determinations of economic public convenience and necessity with respect to specific airlines. Those decisions are left to the Civil

[2]Southwest contends (Br. 39) that the FAA "has no regulatory authority at all under either the 1946 or 1970 Acts." In support of this contention, it gives brief and incomplete quotations from an Order of the FAA entitled "Airports Compliance Requirements," Order 5190.6, August 24, 1973. It may be observed that this "order" is 142 pages long. It includes a six page section entitled "Enforcement." (Section 3) Paragraph 105 states: "While it is not presumed to be necessary to achieve compliance by seeking injunctions or judgments for specific performance in courts, it should be understood that this remedy could be sought should the circumstances warrant." This "order" is in fact a comprehensive set of rules for the exercise of federal power under the Airport Acts. To argue that this order or the National Airport System Plan are not significant because they are not labeled "regulations" ignores their obvious purposes and effect. The question is whether state authorities may nullify that exercise of federal power over air commerce when Congress has preempted the field, *not* whether the exercise of that power is formally entitled a regulation.

Aeronautics Board (CAB), and, for intrastate carriers in Texas, to the TAC. But the FAA, pursuant to its air commerce powers, does establish, develop, and regulate airports and airways. The CAB and the TAC are then free to permit the conduct of interstate and intrastate air transportation, respectively, between *points* through *available* airports. All that the FAA has done here, after consultation with both state and federal officials, is to make the Dallas-Fort Worth Regional Airport (Regional Airport) available to all scheduled airline operations and limited the other area airports to other types of aircraft operations. The TAC is quite free to authorize Southwest to use the Regional Airport. But neither the CAB nor the TAC are now free to *require* service into Love Field.[3]

II.

The respondents seek to minimize the effect of the Federal Airport Act, saying (Southwest Br. 42) that the Federal Airport Plan made by the Federal Aviation Administrator amount only to "making notations on pieces of paper." Such belittling is not relevant. It could also be said that a decree of this Court consists only of "making notations on pieces of paper."

Of course, the Federal Airport Act (see Appendix F to the Petition), first adopted in 1946, was an important step in the assertion of Federal authority with respect to the nation's airspace. By the Federal

[3]The CAB has long recognized this fact and routinely relieved air carriers from requirements to serve a given point because the airport was unavailable to airline operations. *Frontier Certificate Renewal Case*, 14 C.A.B. 519, 535 (1951).

Airport Act, 49 U.S.C. § 1102. Congress not merely "authorized" the Administrator, but "directed" him to prepare a National Airport Plan. This was intended to be an important exercise. Indeed, by the same Act, Congress provided for the making of grants for airport development, and it expressly provided that these grants were to be made "in conformity with the national airport plan prepared and from time to time revised as provided in this chapter. . . ." 49 U.S.C. § 1103(a). Such a plan was prepared with respect to the Dallas-Fort Worth Regional Airport, and it expressly provided that the Regional Airport was "To ultimately accommodate all airline services." Department of Transportation, Federal Aviation Administration, *1966/67 National Airport Plan FY 1968-72* at 186. Based upon this plan, the Federal Government made large grants for the construction of the Regional Airport.

All of these are substantive actions, showing (with other statutes, such as the Federal Aviation Act) the intention of Congress to move into the field, and to exercise its "complete and exclusive national sovereignty in the airspace," 49 U.S.C. § 1508(a), in a comprehensive manner with respect to airport development. The combination of powers granted by Congress to the FAA shows clearly "the pervasive nature of the scheme of federal regulation", *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633 with respect to airport development and usage. If the Federal Airport Plan, developed pursuant to explicit Congressional authorization and direction, is to be effective, there is no room for inconsistent actions of state regulatory authorities such as that undertaken by the TAC here.

It is no answer to say (Br. 40) "that the 1946 Act and the 1970 Act are . . . simply grant statutes setting forth the conditions upon which aid will be rendered to local bodies in the development of their airports." On the contrary, these statutes specifically direct the Administrator to make and keep up to date "a national plan for the development of public airports," and not only provide for grants but expressly provide that no airport development should be supported "other than that included in the current version of the National Airport Plan formulated by the Administrator under this chapter. . . ." 49 U.S.C. § 1108(a). These Acts and the other powers and responsibilities assigned to the Federal Government by Congress, standing alone, show that Congress has occupied the field.

Further recognition of this federal preemption is evidenced by the following excerpt from FAA Order 5190.6, "Airports Compliance Requirements" (cited by Southwest at Br. 36):

> 3. *BACKGROUND OF AIRPORT OBLIGATIONS.* The Federal Aviation Act of 1958 (and the Civil Aeronautics Act of 1938 which preceded it) charges the Administrator with broad responsibilities for the regulation of air commerce in the interests of safety and national defense and for the promotion, encouragement, and development of civil aeronautics. Under these broad powers the FAA seeks to achieve safety and efficiency of the total airspace system through direct regulation of airmen, aircraft, and the airspace. Airports are an essential part of the national airspace system. . . .

The FAA has thus determined that airports are an "essential part of the national airspace system," and must be included in the regulation of that system. Moreover, the FAA has implemented this general policy in numerous instances including the supervision and funding of the development of the Dallas-Fort Worth area airports. Such FAA action, coupled with the Acts of Congress and the FAA's own airspace management policy, leave no doubt as to preemption. Accordingly, there can be no interference with the Federal Airport Plan by a state regulatory body.

III.

The Brief in Opposition of Southwest Airlines states (Br. 27) that the Regional Airport "was constructed to promote the economic well-being of the CAB air carriers." It thus tries to create the impression that the designation of the Regional Airport as the exclusive airport for commercial carriers was achieved only at the initiative of the CAB carriers, and that the CAB was simply the tool of the carriers in making this designation. This, however, is not a fair reflection of the role of the CAB and the FAA in the matter. It entirely overlooks the part which was played by the Administrator of the FAA (the chief officer and spokesman of the Agency) who joined with the Chairman of the CAB in issuing the statement of April 24, 1961, which called for "a single airport serving adjacent communities." See Pet. 25-26. It was the Administrator

of the FAA who made the several airport plans, as directed by Congress, which provided that the Regional Airport should be the exclusive airport for commercial operations. The trunkline air carriers may or may not have found this convenient for their purposes, but the official impetus clearly came from the CAB and, particularly, from the Administrator of the FAA who was responsible for making the airport plans, and for making the grants which made the airport possible.

It is hardly realistic to say that there was no official action here by the Federal Government because the trunk airline carriers were manipulating the CAB and the Administrator of the FAA, in some way, for their own purposes. The fact is that there was substantial and continuous official action, over a long period of time, duly authorized by Congress, pursuant to its "complete and exclusive national sovereignty in the airspace of the United States."

IV.

The Brief in Opposition suggests that there is no question of public interest and concern involved in the case since "the CAB air carriers . . .have undertaken to pay any and all deficits at DFW, including 1.25 times annual debt service on the DFW Revenue Bonds and their guarantee is backed by $150,000,000 in annual net revenues before taxes." Thus, Southwest's argument seems to amount to the proposition that all the resources of the six trunklines must be devoted to the financing of the Regional Airport to the point of the

insolvency of all of these airlines, before any question is presented by the failure of Southwest to comply with the terms of the National Airport Plan. As Southwest says in its Brief in Opposition (Br. 21): "The Finance Director for the Airport Board admitted that all eight CAB underwriting air carriers would have to become bankrupt and go out of business before DFW could lose one penny of revenue as a result of Southwest's remaining at Love." This is a "let the heavens fall" argument which rather emphasizes the legitimate concern of Congress over national airport policy.

Southwest concludes its brief (Br. 53) by saying that: "This case involves no issue beyond the squabbling of the CAB carriers" with respect to "an airport which, for better or worse, they built to suit their own economic requirements." It is, of course, obvious that there is more in this case than "squabbling among the CAB air carriers." There is a steady growth of Federal movement into the area. There is the joint statement of the CAB and the Administrator of the FAA that there should be a "single airport" in the Dallas-Fort Worth area. There is the comprehensive language of the Federal Aviation Act. There is the development of the National Airport Plan by the Administrator of the FAA, as directed by Congress. There are the extensive Federal grants made in reliance upon and pursuant to that Plan. Finally, there is the construction and completion of a great airport developed entirely in reliance on that Plan.

Against this, Southwest presents no equities. It has not been taken by surprise. It came into the field with full knowledge of the existing situation. It knew that

the Airport Plan had been made, that it provided for all scheduled carriers to use the new airport, and it knew that the airport was being built on that basis, with the then existing carriers all agreeing, in accordance with the Plan, that all scheduled flight operations would be concentrated at the new airport. In answer, Southwest says: "Ah, but we are an intrastate airline, and our authorizations come solely from the Texas Aeronautics Commission." It is true that the CAB does not have authority to regulate Southwest Airlines. But this is not enough. Congress has also given great powers in this area to the FAA, and these powers have been exercised by the Administrator of the FAA in such a way as to make the position of Southwest untenable.

Beginning at the bottom of page 42 of its Brief in Opposition, and extending through most of page 43, Southwest Airlines asks a series of questions which, in its view, support its position in this case. However, these questions are easily answered. The FAA does not regulate airlines in the sense that the CAB regulates the economic aspects of interstate air carriers. But the FAA does have extensive power over airports, and these powers are effective with respect to *all* carriers. Its control extends not only to safety, but also to the "development" and "efficiency" of air commerce[4] and the development of a "National Airport Plan." The activities of Southwest are clearly inconsistent with that Plan as it has been developed and promulgated by the Administrator of the FAA pursuant to the directions of Congress.

[4] The words are in 49 U.S.C. §1303.

All that Southwest need do is to comply with the terms of the National Airport Plan. If it complies with those terms, then the TAC has the authority to grant a certificate to it to transport passengers intrastate, and the CAB does not have economic authority with respect to it. But the fact that the TAC can authorize Southwest to operate within Texas does not mean that the TAC has any authority which is inconsistent with the National Airport Plan which has been developed by the Administrator of the FAA pursuant to Congressional direction. The fact that the TAC has authority to grant a certificate to Southwest does not mean that the TAC can determine what airports are available for use by scheduled carriers. That power has been taken over by Congress, and allocated to the Administrator of the FAA. Once this is recognized, all of the questions asked by Southwest on page 42 and 43 of its Brief in Opposition are readily answered.

CONCLUSION

The action of the State of Texas, through the TAC, as interpreted by the Court below, substantially impedes federal control over the uniform development of air commerce. Even if Congress had not spoken, this would be true. As this Court has stated:

> For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this

> Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests. . . .
>
> Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible, . . .or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769, 770

Here, of course, Congress, and the FAA, pursuant to Congressional authorization, have spoken in developing the national airport system. The question whether this action can be thwarted by the state is an important one in the field of federal-state relations.

The history and development of the Federal power with respect to airports in this country shows a continued growth which has become a Federal preemption. On that basis, the decision below is erroneous, and should be reversed. In any event, the question whether there has been preemption with

respect to airports in this country is a question of substantial public importance, well worthy of review of this Court.

Respectfully submitted.

N. ALEX BICKLEY, City Attorney
City of Dallas, Texas
501 City Hall
Dallas, Texas 75201

S.G. JOHNDROE, Jr., City Attorney
City of Fort Worth, Texas
1000 Throckmorton Street
Fort Worth, Texas 76102

LEE E. HOLT, Legal Counsel
Dallas-Fort Worth Regional
Airport Board
P.O. Drawer DFW
Dallas-Fort Worth Airport
Texas 75261

ERWIN N. GRISWOLD
JAMES M. BURGER
Jones, Day, Reavis & Pogue
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

CHARLES S. RHYNE
COURTS OULAHAN
ALFRED J. TIGHE, JR.
DAVID M. DIXON
Rhyne & Rhyne
400 Hill Building
839 Seventeenth Street, N.W.
Washington, D.C. 20006

December, 1974